

FAIR EMPLOYMENT & HOUSING COMMISSION

455 GOLDEN GATE AVENUE, SUITE 10600
SAN FRANCISCO, CA 94102
(415) 557-2325 FACSIMILE (415) 557-0855
www.fehc.ca.gov



MINUTES 472nd COMMISSION MEETING

February 26, 2008
Hiram Johnson State Building
455 Golden Gate Avenue, Santa Barbara Room
San Francisco, California

PRESENT:

Chairman George Woolverton, Vice-Chair Tamiza Hockenhull, Commissioners Linda Ng, Carol Freeman and Carlos Bustamante; and Commission staff Ann Noel, Caroline Hunt, Joseph Ragazzo, Denise Choye, Cynthia Jones and Loc D. Tra; Deputy Assistant Attorney Nancy Beninati; and Department of Fair Employment and Housing Director Phyllis Cheng.

Chairman Woolverton moved, Vice-Chair Hockenhull seconded, and the Commission voted 5:0 to call the meeting to order at 10:02 a.m. [08-01]

OPEN SESSION

REVIEW OF AGENDA

Chairman Woolverton moved, Vice-Chair Hockenhull seconded, and the Commission voted 5:0 to accept the Agenda as submitted. [08-02]

REVIEW OF THE MINUTES

Chairman Woolverton moved, Vice-Chair Hockenhull seconded, and the Commission voted 4:0 to adopt the Minutes and Transactions of the 471st meeting as submitted. Commissioner Bustamante abstained. [08-03]

DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING'S REPORT

DFEH Director Phyllis Cheng reported on recent activities at the Department and her goals for the Department.

Better serve the public using automation: The DFEH has initiated an online automated appointment system for complainants to make appointments with DFEH consultants. In addition, DFEH will soon begin an online “right-to-sue” letter system, which it is asking the California Employment Lawyers’ Association (CELA), a plaintiffs attorneys’ organization, to field test. DFEH has built in safeguards to the “right-to-sue” system advising complainants that they should seek advice of counsel before asking for a “right-to-sue” letter and that obtaining this letter means that DFEH will not investigate their complaint.

Concentrate DFEH legal resources on high impact cases and strengthen DFEH’s legal staff: DFEH Director Cheng has instructed her legal staff to sort out legal cases with the best potential and also to look for cases with the “really bad actors,” with truly egregious violations of the FEHA, even if these cases do not have high damages. Cheng wants to issue Director’s complaints, class actions with precedential potential. The DFEH will not trade working on these cases; however, with attention paid to routine cases. The DFEH will make no cuts to its legal staff with next year’s budget reductions.

The DFEH is seeking Attorney III and IV positions: Cheng is hoping these positions will attract the most skilled attorneys. The DFEH is also seeking a Chief Counsel, a career executive assignment position, and a Senior Staff Counsel for its legal management team.

Restructure DFEH’s organization to handle budget cuts: The Department will principally restructure at the top to handle next year’s budget cuts.

Celebrate the 50th anniversary of the Fair Employment and Housing Act (FEHA): The Department will take a leadership role in celebrating FEHA’s 50th anniversary and looks forward to the next 50 years. Both DFEH and FEHC have a “treasure trove” of historical documents and statistical data that need to be examined. The DFEH does not know what happens to litigants once they “opt-out” or the overall impact of “opting-out.” Cheng wants to invite academic institutions to examine the effect of FEHA to help policy makers examine where we go from here.

Public Outreach: The DFEH will be do major outreach to civil rights groups, community-based groups, government, private employers and housing providers asking how do we make the law better and how do we do our job better?

Chairman Woolverton stated that this public outreach is greatly needed because many people, especially employers, are not aware of the law.

The Commissioners congratulated DFEH Director Cheng on her appointment. Vice-Chair Hockenhull asked Director Cheng if the Department’s recently opened field offices are in danger of closing due to the budget cuts? Cheng replied that they are not and that DFEH is planning on reopening a field office in the Inland Empire due to that area’s rapid growth in population.

Commissioner Freeman asked Cheng how does an employer get served with the DFEH complaint when a right-to-sue letter has been issued and neither the DFEH nor private attorneys are involved? Cheng replied that respondent’s counsel is still served by the DFEH. DFEH continues to give notice to all parties, including employers, to prevent problems for plaintiffs with the statute of limitations.

Commissioner Freeman noted that it is difficult for the public to differentiate between the many existing leave and disability laws. ELAS Noel is hopeful that the Department's public outreach will help clarify and educate the public on these complex leaves and disability laws.

DFEH Director Cheng stated that she welcomed the Commission's advice and looked forward to continuing a great working relationship with the Commission.

COMMISSIONERS' REPORTS

The Commission welcomed new Commissioner Carlos Bustamante. Commissioner Bustamante stated that he appreciated the opportunity to serve the State of California and described his background for the Commission and staff.

ATTORNEY GENERAL'S REPORT

Deputy Attorney General (DAG) Nancy Beninati gave the report for the Civil Rights Enforcement Section of the Attorney General's office.

Beninati reported that the United States Supreme Court has set March 19, 2008 for oral argument in *United States Chamber of Commerce v. Lockyer*, a case challenging a California law which prohibits employers who receive state funds from either promoting or deterring union organizing. Plaintiff argues that statutes such as California's are preempted by the National Labor Relations Act. The State is arguing that statutes such as California's promote employer neutrality regarding union organizing. This high profile case is being handled by Supervising DAG Angela Sierra.

EXECUTIVE AND LEGAL AFFAIRS SECRETARY'S (ELAS) ACTIVITY REPORT

ELAS Noel introduced FEHC's staff and discussed the following items from her Report.

Commissioner Appointments: ELAS Noel welcomed Commissioner Bustamante and stated that the Commission and its staff are looking forward to working with him.

2008-09 Budget: Due to statewide General Fund budget cuts, the Commission will absorb a 10% budget reduction next year. This reduction will result in a \$117,000 loss, which is equivalent to 80% of an Administrative Law Judge position. In January 2008, ALJ Regina Brown left the Commission. The Commission will not fill this position and thus will absorb the budget cut by attrition. Next year, the Commission's travel will be restricted. The Commission will focus on adjudication and rulemaking.

Adjudication and Settlement Conferences: Staff presented hearing case statistics from 2003-07 to the Commission.

AB 1825, Ethics and Open Meeting Act training: ELAS Noel reminded Commissioners that they need to complete the state's online ethics training course offered on the Department of Justice's website. Staff will invite an expert from the Attorney General's office to speak at the next Commission meeting on requirements of the Open Meetings' Act.

Training, Outreach and Public Speaking: Staff has curtailed most of its public speaking to focus on regulatory work.

LEGISLATION

ALJ Ragazzo gave the Legislative report. Ragazzo discussed the status of AB 1818 (FEHA Military Veterans Housing) and AB 2874 (FEHA-Ralph Act Damage Awards), the latter of which would remove the current cap of \$150,000 on FEHC actual damage awards for violation of the Ralph Act.

REGULATIONS

ELAS Noel reported on the Commission's regulatory projects for 2008-09.

Pregnancy Regulations: ELAS Noel reviewed with the Commission the main changes staff has proposed for the pregnancy regulations. The Commission referred the proposed pregnancy regulations to the Commission regulations subcommittee for further revisions prior to beginning the rulemaking process after May 6, 2008. The DFEH will also be involved in the subcommittee process.

Disability Regulations: ELAS Noel reported staff is working on the disability regulations and will begin rulemaking on these regulations after the pregnancy regulations.

Housing Regulations: ELAS Noel stated that staff is also working on the housing regulations and will begin rulemaking on these regulations after the disability regulations. Commission staff will set up a working committee consisting of housing providers and advisors in the field representing tenants and applicants to work with the Commission on these regulations.

COMMISSION FUTURE MEETINGS

The Commission set its upcoming meetings for the rest of 2008 for May 6, July 8, September 25 and December 9.

PUBLIC COMMENTS

There were no public comments.

Chairman Woolverton moved, Vice-Chair Hockenhull seconded, and the Commission voted 5:0 to end Open Session. [08-04]

The Commission took a 10 minute recess at 11:15 a.m.

CLOSED SESSION

Chairman Woolverton moved, Vice-Chair Hockenhull seconded, and the Commission voted 5:0 to enter Closed Session at 11:25 a.m. [08-05]

Only the Commissioners, Commission staff, Department staff and Attorney General staff were present.

The Commission discussed writs, hearings and litigation and deliberated on pending cases. DAG Beninati reported on the following writs and appeals of the Commission's decisions.

Writs and Appeals

(1) DFEH v. San Francisco BART (Bartley)

On January 22, 2008, the parties stipulated to the following schedule for briefing: Appellant-BART's opening brief is due on April 7, 2008 and the Commission-respondent's brief is due on July 7, 2008. DAG Kathy Mikkelsen represents the Commission.

(2) DFEH v. Sasco Electric (Scherl)

On January 25, 2008, the AG's Office filed an Answer to the Petition. All parties involved had reached agreement on a briefing schedule and a proposed hearing date of March 20, 2008. However, the case was recently transferred to a different judge and the petitioner is considering whether to accept this judge before filing the stipulation. DAG Antonette Cordero represents the Commission.

(3) DFEH v. Prunty's New Beginnings (Project Sentinel/Jensen)

On January 8, 2008, the Santa Clara County Superior Court granted the Petition and remanded the matter to the Commission. The court ruled that the Commission failed to apply the Commission's own standard for awarding attorney's fees set forth in the precedential decision DFEH v. Raytheon. DAG Nancy Beninati represents the Commission.

Chairman Woolverton moved, Commissioner Bustamante seconded, and the Commission voted 5:0 to instruct staff to draft a proposed revised decision based upon the Superior Court's order, to be presented to the Commission at the next Commission meeting for a vote. [08-06]

Administrative Adjudication: *Pending Decisions, Hearings Completed – 100 days for FEHC to act in [bold]*

ALJ Hunt presented the following case.

(1) DFEH v. Sacramento Unified School District (Funaroff) **[no 100 day deadline]**

Commissioner Bustamante moved, Chairman Woolverton seconded, and the Commission voted 5:0 to issue a final decision which dismisses the accusation in this case. [08-07]

At 12:05 p.m. ALJ Ragazzo left the room and ALJ Hunt presented the following case.

Commissioner Freeman recused herself from voting on this matter due to a possible conflict of interest.

(2) DFEH v. Gonzales (Banks/Project Sentinel) **[4/4/08]**

Chairman Woolverton moved, Commissioner Hockenhull seconded, and the Commission voted 4:0 to adopt the proposed decision. [08-08]

At 12:15 p.m. ALJ Ragazzo rejoined the meeting to present the following case.

(3) DFEH v. Buckley Trust (Moreno) **[5/8/08]**

Chairman Woolverton moved, Commissioner Hockenhull seconded, and the Commission voted 3:2 to adopt the proposed decision. Both Commissioners Freeman and Bustamante dissented on the amount of compensatory damages awarded. [08-09]

At 12:27 p.m. ALJ Ragazzo left the room and ELAS Noel presented the following case. ELAS Noel asked Commissioner Bustamante if this case might pose a possible conflict of interest to him, to which he replied no.

(4) DFEH v. City of Fullerton (Montero) **[5/23/08]**

Chairman Woolverton moved, Commissioner Bustamante seconded, and the Commission voted 5:0 to adopt the proposed decision. [08-10]

Chairman Woolverton moved, Commissioner Ng seconded, and the Commission voted 5:0 to make the decision precedential. [08-11]

Chair Woolverton moved, Vice-Chair Hockenhull seconded, and the Commission voted 5:0 to end Closed Session and to adjourn the meeting at 12:34 p.m. [08-12]

ADJOURNMENT

The Commission adjourned its meeting and the forum at 12:34 p.m.

Date: February 26, 2008

GEORGE WOOLVERTON
Chairman

ANN M. NOEL
Executive and Legal Affairs Secretary

REPORT OF TRANSACTIONS OF THE 472nd COMMISSION MEETING

**February 26, 2008
San Francisco, California**

THE COMMISSION AT THIS MEETING TOOK THE FOLLOWING ACTIONS:

- 08-01 Voted 5:0 to call the meeting to order.
- 08-02 Voted 5:0 to accept the Agenda as submitted.
- 08-03 Voted 4:0 to approve the Minutes and Transactions of the 471st meeting.
Commissioner Bustamante abstained.
- 08-04 Voted 5:0 to end Open Session.
- 08-05 Voted 5:0 to enter Closed Session.
- 08-06 Voted 5:0 to instruct staff to draft a proposed revised decision based upon the Superior Court's order, to be presented to the Commission at the next Commission meeting for a vote in DFEH v. Prunty's New Beginnings (Project Sentinel/Jensen).
- 08-07 Voted 5:0 to issue a final decision which dismisses the accusation in DFEH v. Sacramento Unified School District (Funaroff).
- 08-08 Voted 4:0 to adopt the proposed decision in DFEH v. Gonzales (Banks/Project Sentinel). Commissioner Freeman recused herself.
- 08-09 Voted 3:2 to adopt the proposed decision in DFEH v. Buckley Trust (Moreno). Commissioners Freeman and Bustamante dissented on the amount of compensatory damages awarded.
- 08-10 Voted 5:0 to adopt the proposed decision in DFEH v. City of Fullerton (Montero).
- 08-11 Voted 5:0 to make the decision precedential in DFEH v. City of Fullerton (Montero).
- 08-12 Voted 5:0 to end Closed Session and to adjourn the meeting.

Prepared By

Loc D. Tra
Clerk of the Commission